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B. Chamberlain

DEPUTY CLERK

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

MEMORANDUM

Honorable Warren Darrow
Division 6

FILED UNDER SEAL

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney,
and her deputy undersigned, hereby submits its Memorandum as requested by this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

From day one the State has alleged that Defendant brutally murdered Carol for money. Listed in numerous pleadings filed by the State are allegations that Defendant's motive consists of Defendant's attempt to collect nearly \$8,300.00 he claimed Carol owed to him but refused to pay, avoiding payment to Carol of approximately \$560,000.00 in spousal support, and collecting Carol's life insurance proceeds which exceeded \$750,000.00.

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DIVISION 6

1 In its presentation to the grand jury on February 6, 2009¹, the State [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13
14 Mr. Sears has had a copy of Carol's Last Will and Testament since at least November
15 of 2008. The provisions of the will and testamentary trust are clear and direct. Debts were to
16 be paid and any residual was to be held in trust for Carol's daughters. The smaller of the two
17 life insurance policy proceeds, \$256,830.56, was to be paid directly to the testamentary trust.
18 The will provided that the trust was to be held until the oldest daughter reached 25 years of
19 age. At that time the trust was to be split into equal shares between the daughters. The only
20 exception was if funds were needed for the "health, maintenance, support and education" of
21 the daughters. Any other use of the funds would have required court approval.
22
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24

25 ¹ The case was originally presented to the grand jury in October 2008; however, the case was
26 remanded for a new finding of probable cause.

² [REDACTED]
[REDACTED]

1 LAW AND ARGUMENT

2 I. *Conflict of interest.*

3 "The guarantees of the Sixth Amendment include the right to an attorney with
4 undivided loyalty. Counsel must be free to zealously defend the accused in a conflict-free
5 environment." *Romley v. Schneider*, 202 Ariz. 362, 364, 45 P.3d 685, 687 (App.2002)
6 (citations omitted). See also *United States v. Greig*, 967 F.2d 1018, 1021 (5th Cir.1992) (A
7 defendant's right to effective assistance of counsel includes the right to representation free
8 from a conflict of interest.) It has long been held that "like the right to counsel of any kind,
9 the right to conflict-free counsel can be waived." *Greig* at 1021 (citations omitted). For a
10 waiver to be effective, the record must show that the trial court determined that it was
11 knowingly, intelligently, and voluntarily done. *Id.*

12
13 "A court disqualifying an attorney may base its ruling on one of two grounds: (a)
14 conflict of interest, and (b) integrity of the judicial system." *United States v. Snyder*, 707
15 F.2d 139, 145 (5th Cir.1983) (abrogated on other grounds).

16
17 Under the conflict of interest analysis, the trial judge ordinarily attempts to
18 determine whether the interests of the attorney conflict with those of his
19 client. A finding that there is a conflict does not, however, end the analysis. In
20 *United States v. Garcia*, 517 F.2d 272 (5th Cir.1975), we recognized that
21 defendants may waive their right to conflict-free representation. *Id.* at 275. An
22 accused's right to waive conflict-free representation may not be absolute.
23 Where the conflict of interest was so serious as to render a trial inherently
24 unfair, we have held that the accused has been deprived of his right to
25 effective assistance of counsel. *Uptain v. United States*, 692 F.2d 8, 10 (5th
26 Cir.1982).

23 *Id.*

24 The record must show that the court, defense attorney or the prosecutor informed the
25 defendant of the precise manner in which he might be prejudiced by defense counsel's
26 representation. *United States v. White*, 706 F.2d 506, 508 (5th Cir. 1983). In the instant case,

1 the prosecutor has informed Defendant exactly how he might be prejudiced by the filing of
2 the Motion for Determination of Counsel. It is unknown whether defense counsel informed
3 Defendant of how counsel's assistance in obtaining the life insurance proceeds could impact
4 his defense at trial. Without comment, the Court declined the State's request to provide
5 Defendant with independent counsel to review the issue and aid Defendant in making an
6 informed decision regarding continued representation.
7

8 In *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3rd Cir.1984), the appellate
9 court determined the defendant was denied effective assistance of counsel due to her counsel's
10 conflict of interest. The issue stemmed from a situation where law enforcement went to Zepp's
11 residence to arrest her roommate on drug-related charges. The roommate was arrested and
12 removed from the scene. Zepp's attorney arrived about the same time and he and Zepp entered
13 the home and closed the door. Moments later officers waiting outside "heard a toilet flush
14 several times." *Id.* at 128. Within the hour Zepp was arrested and a subsequent search of the
15 residence's septic system "produced 40 triangular-shaped plastic bags, 20 of which tested
16 positive for cocaine residue." *Id.* The appellate court determined Zepp's attorney "was
17 potentially liable for aiding and abetting or encouraging the destruction of evidence" and that
18 even if the attorney were not criminally charged, "trial counsel could have faced severe
19 disciplinary consequences." *Id.* at 136. The court found that under the circumstances "it is
20 unrealistic ... to assume that Zepp's attorney vigorously pursued his client's best interest
21 entirely free of his own concern to avoid his own incrimination" and "that from these facts
22 alone there was an actual conflict which required withdrawal by trial counsel or
23 disqualification by the court." *Id.*
24
25
26

1 *Arizona Ethics Rules*, ER 4.1(a) states that "[i]n the course of representing a client a
2 lawyer shall not knowingly make a false statement of material fact or law to a third person.
3 Included in the comment section of ER 4.1 is the following paragraph regarding
4 misrepresentation:

5 A lawyer is required to be truthful when dealing with others on a client's
6 behalf, but generally has no affirmative duty to inform an opposing party of
7 relevant facts. A misrepresentation can occur if the lawyer incorporates or
8 affirms a statement of another person that the lawyer knows is false.
9 ***Misrepresentations can also occur by partially true but misleading
statements or omissions that are the equivalent of affirmative false
statements.***

10 (emphasis added).

11 ER 4.3 provides that:

12 In dealing on behalf of a client with a person who is not represented by
13 counsel, a lawyer shall not state or imply that the lawyer is disinterested.
14 When the lawyer knows or reasonably should know that the unrepresented
15 person misunderstands the lawyer's role in the matter, the lawyer shall make
16 reasonable efforts to correct the misunderstanding. The lawyer shall not give
17 legal advice to an unrepresented person, other than the advice to secure
18 counsel, if the lawyer knows or reasonably should know that the interests of
19 such a person are or have a reasonable possibility of being in conflict with the
20 interests of the client.

21 When interviewed in the presence of her attorney on July 14, 2010, (*See Exhibit D –*
22 *Transcript of Renee Girard Interview dated July 14, 2010*), Defendant's newly estranged girl-
23 friend, Renee Girard, stated she learned Defendant sought access to the proceeds from
24 Carol's life insurance policies for his own benefit as early as August 2008. Ms. Girard stated
25 that by January 2009, it was evident Defendant intended to use the proceeds to pay his
26 attorney's fees. It is important to note that as recent as a just a few weeks ago, Ms. Girard
possessed only negligible familiarity with the titles and roles associated with managing

1 estates and trusts and even lesser understanding of the fiduciary duties associated with those
2 titles.

3 Here, the State obtained the opinions of two independent experts in the field of Trusts
4 and Probate. (See Exhibits E and F, Statement of James Musgrove and Marlene Appel
5 respectively). Both agree that at the very least, the appointment of Katherine DeMocker as
6 Personal Representative of the Estate of Carol Kennedy and Renee Girard as Trustee of the
7 Testamentary Trust are violations of terms of the Last Will and Testament of Carol Kennedy,
8 and violations of the *Arizona Rule of Professional Conduct*.

9
10 Mr. Sears admits he solicited Ms. Girard on behalf of his client to serve as Trustee for
11 the Testamentary Trust. Mr. Sears knew or should have known this was in violation of the
12 provisions of the trust. According to Ms. Appel, Certified Specialist in Estates and Trust Law,
13

14 To the extent the attorneys advised Katie or Girard regarding the
15 handling of the trust funds while representing Steven DeMocker or his interests,
16 they violated Ethical Rule 1.7 prohibiting concurrent conflicts of interest. To
the extent any such conflicts were waivable, and I do not think they were, they
were obligated to obtain written informed consent from Katie and Girard.

17 See Exhibit F, Page 9.

18 Ms. Girard was not represented by counsel at that time. Ms. Girard was not told what
19 the responsibilities of a trustee would entail. Ms. Girard was and remains uncertain of the "job
20 description" for the position. Ms. Girard believed she would only be "helping to finish out
21 estate affairs," see Exhibit D, Interview of Renee Girard, Page 14. ¶ 3, and had no
22 understanding that she would be required to handle the proceeds from Carol's life insurance.
23 In fact, she "didn't think [she] was going to have anything to do with the money." *Id.* Page 14-
24 15.
25
26

1 The record undeniably shows Mr. Sears, through misrepresentation and omission of
2 certain facts to a third person not represented by counsel, and acting in concert with his client
3 aided and abetted him in accomplishing Defendant's long planned motive in the killing of
4 Carol Kennedy.

5
6 To the extent any of the attorneys advised Girard and Charlotte
7 regarding the handling of the trust assets, while Girard and Charlotte were
8 unrepresented, they violated Ethical Rule 4.3. The comments to the rule state
9 that the risk of the attorney compromising the interests of unrepresented persons
10 is so great that all the attorneys can do is advise the other person to obtain
11 counsel. The comments also takes into the (sic) consideration the experience
12 and sophistication of the other person and the circumstances.

13 See Exhibit F, Page 9.

14 Again, Ms. Appel reasons that:

15 To the extent Steven DeMocker, Attorney Kottke, Attorney Sears, any
16 of the other attorneys and Janice DeMocker knew that the action taken by
17 Katei and Girard were breaches of duty and tort, they aided and abetted in the
18 diversion of the trust assets in violation of the trust terms and the duties owed
19 to the trust beneficiaries. To the extent any if the facts should have been
20 reported to the court, they violated the candor to the court required by Ethical
21 Rule 3.3.

22 See Exhibit F, Page 8.

23 Furthermore, the "funneled" distribution of the insurance proceeds resulting in the
24 payment of \$700,000.00 from the Estate and Testamentary Trust bank account for Defendant's
25 benefit is a direct violation of the express directives of the murdered victim, Carol Kennedy.

26 Additionally, even though the insurance proceeds totaled over three-quarters of a
million dollars, there was absolutely no mention of the substantial amount in the probate file.
The most flagrant violation is the distribution of the trust funds without court. This constitutes

1 a blatant violation of the fiduciary's duty as trustee under the direction of the gaggle of
2 attorneys representing Steven DeMocker.

3 **CONCLUSION**

4 The State believes Mr. Sears' part in obtaining for Defendant's benefit nearly the full
5 amount of the two life insurance policies is a clear violation of the *Arizona Rules of*
6 *Professional Conduct* which may result in criminal liability as well. As the State has
7 avowed, no criminal investigation of any member of the defense team regarding this issue
8 will be performed by the Yavapai County Attorney's Office.

9 This Court needs to understand and accept the fact the insurance body of evidence
10 was brought into this case by Attorney Sears in his opening statement. As it now stands, the
11 defense is putting up a full frontal assault on the State in an effort to keep the truth from the
12 jury. No matter how loud and how much noise is made by the defense attorneys, it is the
13 defense's conduct at issue here and not the State's. The defense would like nothing better
14 than to blame their predicament on the State. The Court is urged not to take its eye off the
15 ball. This jury has an unquestionable right to know the circumstances surrounding the
16 disclaimer and how the life insurance proceeds were funneled for the benefit of Defendant.
17 After all, Attorney Sears promised as much in his opening statement.

18
19
20 RESPECTFULLY SUBMITTED this 6th day of August, 2010.

21
22 Sheila Sullivan Polk
23 YAVAPAI COUNTY ATTORNEY

24
25 By: 

26 Jeffrey G. Paupore
Deputy County Attorney

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1 COPIES of the foregoing delivered this
2 6th day of August , 2010, to:

3 Honorable Warren Darrow
4 Division 6
5 Yavapai County Superior Court
6 (via email)

7 John Sears
8 511 E.. Gurley St.
9 Prescott, AZ 86301
10 Attorney for Defendant
11 (via email)

12 Larry Hammond
13 Anne Chapman
14 Osborn Maledon, P.A.
15 2929 North Central Ave, 21st Floor
16 Phoenix, AZ
17 Attorney for Defendant
18 (via email)

19 Christopher B. DuPont
20 Trautman DuPont
21 245 West Roosevelt, Suite A
22 Phoenix, AZ 85003
23 Attorney for victims
24 Katherine and Charlotte DeMocker
25 (via email)

26 John Napper
634 Schemmer, Ste 102
Prescott, AZ 86305
Attorney for Renee Girard
(via email)

By: Deborah Couell

STATE'S EXHIBIT A

Page 117 from Transcript of Grand Jury Proceedings
dated February 6, 2009

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HEIDI ANDERSON

STATE'S EXHIBIT B

Page 145 from Transcript of Grand Jury Proceedings
dated February 6, 2009

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STATE'S EXHIBIT C

Chronology of Events with Exhibits in
Support of [REDACTED]

CHRONOLOGY OF EVENTS WITH EXHIBITS
IN SUPPORT OF [REDACTED]

- 1) Carol Kennedy, the decedent, was murdered on July 2, 2008. At the time of her death, Carol Kennedy had a valid Last Will and Testament executed on June 23, 1998. *Exhibit A, Last Will and Testament of Carol Kennedy, Bates ## 025865-025875.*
- 2) According to the terms of the Last Will and Testament of Carol Kennedy, all residual assets of her estate not otherwise directed in her Will are to be poured into the Testamentary Trust. The beneficiaries of the Testamentary Trust are the two daughters of Carol Kennedy, Katherine (Katie) DeMocker (date of birth: 5/19/88) and Charlotte DeMocker (date of birth: 10/11/91). According to the terms of paragraph 6.2 of the Will, trustees of the Testamentary Trust “are to be guided by my [Carol Kennedy] desire (i) to provide for the education of my children and to encourage them to obtain a college degree, and (ii) to provide adequately for the health of my children.” *Id. at Para. 6.2.*
- 3) The Will further provides that the trustees “shall hold the trust estate as a single trust until my oldest child has attained the age of twenty-five (25) years, or sooner died” and that distribution may occur from time to time “for the benefit of the children as Trustees, in their discretion, shall determine is necessary or appropriate for the health, maintenance, support and education...of my children.” *Id.* When each daughter has reached the age of 25, the Will provides for the distribution of their shares “as reasonably practicable outright and free of trust to such child.” *Id. at Para. 6.4.1, Last Will and Testament of Carol Kennedy.* To date, neither daughter has attained the age of 25.
- 4) Regarding the appointment of Personal Representative for of the Last Will and Testament of Carol Kennedy, the Will provides that if all named Personal Representatives in

the Will fail to qualify or cease to act as Personal Representative, "I nominate and appoint A.G. Edwards Trust Company, or its successor, as Personal Representative hereunder." *Id. at Thirteenth paragraph.*

5) Regarding the appointment of Trustees for the Testamentary Trust, the Will provides that if all named Trustees cannot serve, that "A.G. Edwards Trust Company or its successor shall serve as sole Trustee of the trusts." *Id. at Twelfth Paragraph.*

6) At the time of her death, Carol Kennedy had two (2) Hartford Life insurance policies, to-wit: a 1998 policy no. [REDACTED] in the amount of \$250,000.00, and a 2001 policy no. [REDACTED] in the amount of \$500,000.00. On each life insurance policy, Carol Kennedy was the insured and Steven DeMocker (hereinafter "DeMocker") was the beneficiary. On the policy for \$250,000.00 dollars [REDACTED], the contingent beneficiary was the Testamentary Trust contained in Carol Kennedy's will. *Exhibits D & E, Hartford Life Insurance Policies, Bates ## 25926-25928, 026082-026085.*

7) On August 8, 2008, a "Petition for Formal Probate of Will; Appointment of Personal Representative; and Replacement of Trustee of Testamentary Trust" was filed by Attorney Christopher Kottke on behalf of Petitioner Katherine DeMocker in Yavapai County Superior Court Probate No. P1300PB 2008 0202. The Petition sought the appointment of Katherine DeMocker as Personal Representative of the Estate. *Exhibit B, Petition for Formal Probate of Will, para. 1, Bates #025856-025862.* This appointment appears to be in violation of the terms of the Last Will and Testament of Carol Kennedy.

8) In the Petition, replacement of the trustee of the Testamentary Trust was also sought. Paragraph 13 of the Petition informed the Court that "Petitioner submits that the Decedent's residual estate will likely be of a limited value and A.G. Edwards's trustee fees would not be

cost effective for the trust to absorb.” *Exhibit B, para. 13*. There is no evidence in the Yavapai County Superior Court, Probate file no. P1300PB 2008 0202, that the probate judge was ever informed of the existence of \$750,000.00 in life insurance proceeds.

9) Paragraph E of the Petition requested the appointment of Katherine G. DeMocker as trustee of the testamentary trust created under the Will of the Decedent. Judge Mackey of the Yavapai County Superior Court signed an Order appointing Kathleen DeMocker as Trustee. *Exhibit B, Exhibit C, Order of Appointment, Court’s Probate File*. This request for the appointment of Katherine DeMocker as trustee of the testamentary trust appears to violate paragraph 12.1 of the Last Will and Testament that provides for the appointment of “any bank or trust company having combined capital and surplus of not less than One Million Dollars (\$1,000,000.00), wherever located, as successor Trustee.” *Exhibit A, para. 12.1*. The Probate of the Estate of Carol Kennedy has not been closed.

10) On August 20, 2008, DeMocker filed a death benefits claim with Hartford on the insurance policies. *Exhibit F, Bates # 026112, 025920, 026114*. Hartford denied DeMocker’s claims on August 27, October 1, November 21 and December 16, 2008, and on January 15, 2009. *Exhibit G, Bates ## 025983-025987*.

11) On September 3, 2008, DeMocker sent a letter to Hartford (CC to attorney John Sears) inquiring how to disclaim the death benefits under the two policies and to direct the proceeds to his daughters. *Exhibit H, Bates # 026115*.

12) On October 14, 2008, the Court issued an Order appointing Katherine DeMocker, daughter of the deceased, as both Personal Representative of the Estate of Carol Kennedy and Trustee of the Testamentary Trust. *Exhibit C*

13) On October 23, 2008, Steven DeMocker was arrested and subsequently indicted for first degree murder in the death of Carol Kennedy in State v. DeMocker, Yavapai County Superior Court Cause No. P1300 CR 2008 1339 (hereinafter "State v. DeMocker").

14) On January 17, 2009, DeMocker told Renee Girard, his girlfriend, he had met with "another attorney...the guy who's representing me on the Estate related Stuff" and that he had a plan to "cover everything." *Exhibit I, Transcript of Jail Call, Jan. 17, 2009, at 1508 hours, pp. 1-3.*

15) Disclaimers on the two life insurance policies were executed by DeMocker on March 3, 2009; and a disclaimer of any and all interest under the Last Will and Testament of Carol Kennedy was executed by DeMocker on March 24, 2009. Attorney John Sears, counsel for DeMocker in the criminal case, notarized the signature of DeMocker on all three disclaimers. Attorney Robert Schmitt, acting on behalf of DeMocker, provided all three disclaimers to Hartford Insurance Company on March 30, 2009. *Exhibit J, Letter from Schmitt to Hartford Insurance Company with Disclaimers, Bates # 025848-52; 026046.*

16) In a telephone conversation on March 17, 2009, DeMocker informed his daughter Katie:

... these are resources that uhm you know for reasons you understand need to be set aside under your control for now but that this is, these are resources I have to be pretty sure I you know I'm in, that I am gonna make the decisions about how they're deployed.

Exhibit K, Jail telephone call with Katie DeMocker, 03-17-2009, 1039 hours, 8 pages of transcript at p. 1. After Katie DeMocker told DeMocker she wanted to make sure that Charlotte DeMocker goes to college, DeMocker informed Katie:

I understand your concern but that, that is, that is unfortunately at this point, that has to be down the scale of priorities below bond first, defense second. . .

. . . But we may need every penny of it for defense and I need to make certain that you understand that there will be no impediment to that if that's what we need.

Id. at p. 2. (YCSO Evidence #6107, disclosed on June 22, 2009, State's 22nd Supplemental Disclosure; Court's Exhibit #602.)

17) On April 13, 2009, proceeds from both life insurance policies were paid. Hartford Insurance Company issued a check in the amount of \$256,830.58 to the Virginia C. Kennedy Testamentary Trust, Katherine DeMocker, Trustee, *Exhibit L, Bates # 025811*, and a check for \$513,661.11 to the Estate of Virginia Carol Kennedy. *Exhibit M, Bates # 026080*.

18) On April 16, 2009, \$513,661.11 was deposited into the Bank of America account for the Estate of Virginia Carol Kennedy, Katherine DeMocker Personal Representative. *Exhibit N, Bates # 026261*. On or about April 30, 2009, a copy of the statement for this account reflecting this transaction was mailed to Chris Kottke, the probate attorney. *Exhibit O, Bates ## 026260-63*.

19) On April 23, 2009, a deposit of \$256,830.58 was made into the account of the Virginia Carol Kennedy Testamentary Trust, Katherine DeMocker, Trustee. *Exhibit P, Bates # 026292*. On or about April 30, 2009, a copy of the statement for this account reflecting this transaction was mailed to Chris Kottke, the probate attorney. *Exhibit Q, Bates ## 025802-03*.

20) On May 9, 2009 a jail call from Steven DeMocker to Renee Girard stating Defense attorneys have agreed to cap the attorney's fees. *Exhibit HH, 8 pages of Jail Call Transcript*.

21) On July 10, 2009, DeMocker, as guardian for Charlotte DeMocker, signed a document that purported to accept the resignation of Katherine DeMocker and consented to the appointment of Renee Girard, the girlfriend of DeMocker, as Successor Trustee. This

document is also signed by Renee Girard, "acting under parental Power of Attorney for Charlotte DeMocker." Attorney John Sears obtained the signature of DeMocker, who was and remains incarcerated, on this document. This document is also signed by Katherine DeMocker. The document was prepared by attorney Chris Kottke. *Exhibit V, bates # 025813-025815.*

22) Also on July 10, 2009, according to a minute entry dated the same date, an *Ex Parte, In Camera* Under Seal Hearing on the record took place in State v. DeMocker, presided by Hon. Thomas Lindberg and attended by DeMocker, John Sears, and attorney Larry Hammond. *Exhibit JJ – Minute Entry*

23) On July 13, 2009, a pleading was filed in State v. DeMocker by attorney John Sears indicating that DeMocker had been determined to be indigent by the court. *Exhibit KK – Defendant's Motion for Transcripts filed July 13, 2009*

24) On August 12, 2009, Katherine DeMocker withdrew \$453,984.89 from the account for the Estate of Virginia Carol Kennedy and deposited it into the account for the Virginia C. Kennedy Testamentary Trust. *Exhibit R, Bates ## 026277, 026304.*

25) On August 17, 2009, Katherine DeMocker withdrew \$354,737.54 from the Testamentary Trust account and deposited that amount into her personal bank account. *Exhibit S, Bates ## 026304, 026586.*

26) On August 27, 2009, Katherine DeMocker wire transferred \$350,000 from her personal account to Janice DeMocker, mother of DeMocker Steven DeMocker. *Exhibit T, Bates # 026645.* By August 28, 2009, Janice DeMocker had wired \$250,000.00 to the Osborn Maledon law firm and \$100,000.00 to John Sears, presumably for payment of DeMocker's attorneys' fees. *Exhibit U, Bates # 026649.*

27) On August 17, 2009, Katie DeMocker resigned as Trustee of the Testamentary Trust and accepted the appointment of Renee Girard, DeMocker's girlfriend, as successor Trustee. *Exhibit V, Bates # 025813, 025815.* On August 28, 2009, Renee Girard signed her acceptance as Trustee of the Testamentary Trust. *Exhibit W, Bates # 025816.* On September 21, 2009, Renee Girard signed the Bank of America signature card as Trustee of the Testamentary Trust. *Exhibit X, Bates # 025812.*

28) The resignation of Trustee and acceptance as Trustee documents are signed by Katie DeMocker, Renee Girard and DeMocker, as guardian for the minor daughter Charlotte Democker. Attorney Chris Kottke prepared the documents for this substitution of Trustee, his paralegal notarized signatures, and attorney John Sears obtained the signature of DeMocker. *Exhibit FF, Yavapai County Attorney's Office Supplementary Report, Case # 2009-252713, dated July 9, 2010.*

29) On September 15, 2009, Attorney Chris Kottke filed a Proof of Delivery of Final Accounting in the probate matter. *Exhibit GG, Proof of Final Accounting in the Matter of the Estate of Virginia Carol Kennedy, No. PB20080202.*

30) In a telephone call between DeMocker and Renee Girard on September 15, 2009, DeMocker stated:

I don't think, I have no reason to believe there's been any kind of shell game other than the one that's legally appropriate that we've had to do to get the legal team paid.

Exhibit Y, 11 pages of Transcript of call 9/15/2009 between DeMocker and Girard, YCSO Evidence #6121 disclosed on November 24, 2009, State's 40th Supplemental Disclosure; Court's Exhibit #609.

31) On October 19, 2009, DeMocker called Renee Girard and asked her: "Do you feel like moving three hundred and fifty thousand around today?" *Exhibit Z, 2 pages of Jail Call transcript between DeMocker and Girard.* DeMocker then directed Renee Girard to transfer an additional \$350,000.00 from the Testamentary Trust account to DeMocker's joint bank account with Charlotte DeMocker at Bank of America (acct. no. [REDACTED]). This transfer occurred that same date. *Exhibit AA, Bates #026310, 026476.* On October 19, 2009, a wire transfer in the amount of \$350,000.00 was made from Charlotte and DeMocker's joint account to the account of Janice DeMocker, DeMocker's mother. *Exhibit BB, Bates # 025830.*

32) On October 27, 2009, Janice Democker made out two personal checks. The first was in the amount of \$100,000.00 payable to John Sears. The second was in the amount of \$250,000.00 dollars and made payable to Osborn and Maledon. *Exhibit CC, Bates # 025834-35.*

33) The appointment of Katie DeMocker as Trustee of the Testamentary Trust is in violation of the terms of the Last Will and Testament of Carol Kennedy. *Exhibit A, Last Will and Testament of Carol Kennedy, para. Twelfth and 12.1.* The successor appointment of Renee Girard as Trustee of the Testamentary Trust is in violation of the terms of the Last Will and Testament of Carol Kennedy. *Id.*

34) There is no evidence in the Yavapai County Superior Court, Probate file no. P1300PB20080202, that the probate judge was ever informed of the existence of \$750,000.00 in life insurance proceeds, any change in trustees, or the complete distribution of the trust corpus, in violation of the terms of the Trust. *Exhibit B.*

35) On information and belief, the State alleges that DeMocker has received public funds in the form of payments by the Yavapai County Public Defender to pay for his defense.

Exhibit DD, Email from Public Defender Dean Trebesch to County Administrator Julie Ayer dated April 16, 2010.

36) On June 3, 2010, during his Opening Statement, John Sears, counsel for DeMocker told the jury:

Let's talk about what the evidence will really show about the life insurance policies. ... But \$750,000 in two policies on Carol's life. ... Those policies weren't mentioned in the divorce. They weren't divided in the divorce. They weren't dealt with. They were just there. ...

Mr. DeMocker then persuaded them [Hartford Insurance Co.] that Mr. DeMocker would disclaim this money. You will hear from Katie and Charlotte that their father told them from the beginning, this is your money from your mother. This isn't mine. He disclaimed, he signed over any interest to the girls, and **the money was paid out to the girls**. That is what happened in this case. So the idea dangling after the State's opening that Mr. DeMocker killed her for the insurance money, has to be measured against what the evidence really would be.

... Wouldn't it be unusual and a head-scratcher **if he didn't get that money for the girls, which is where the money went in this case?** That's the motive. That is a hundred percent of the motive. He killed her because he didn't want to pay her the alimony. He killed her over the squabble over the \$4,500, and killed her for the insurance money in this case.

Exhibit EE, Reporter's Partial Transcript of Proceedings Opening Statement by Mr. Sears, pages 30-32.

37) On July 13, 2010, Judge Warren R. Darrow ordered the State's Motion for Determination of Counsel, this attached chronology and exhibits sealed. *Exhibit II, Minute Entry dated July 13, 2010.*

38) Attorney James. B. Musgrove's legal opinion expressed after examination of the probate file for Virginia Carol Kennedy. *Exhibit LL – Statement of James B. Musgrove*

STATE'S EXHIBIT D

Transcript of Renee Girard Interview dated July 14, 2010

Mr. Napper: It's about 7:00 in the morning; this is an interview of Renee Girard. Present are myself John Napper, I represent Ms. Girard. Joe Butner's here on behalf of the state. Mike Sechez is here on behalf of the state. Tom Boelts is here also on behalf of the state and I guess the Sheriff's Department. This is an interview related to Renee Girard's understanding and involvement in the transfer of the insurance funds in the DeMocker case. It's the agreement of everyone in the room that these statements will not be used against Ms. Girard in the prosecution provided that she tells the truth in her statements this morning. And with that Renee why don't you tell us when, how you became, how you started to understand how the insurance proceeds from Carol Kennedy's death would be used in this case

Mr. Butner: And, and when

Mr. Napper: and when, right

Renee: Uhm to the best of my recollection it, I started to understand that that's how insurance monies were hoping to be spent if they could give them the least uhm

Mr. Napper: When you say how to be spent, what do you mean by that, where were they going to be spent?

Renee: It was my understanding that there was a hope that insurance monies would be used to pay attorney's fees.

Mr. Napper: And around when?

Renee: I think it was sometime before Steve's arrest and it might have been shortly thereafter but it was somewhere, somewhere right in there.

Mr. Napper: And where did that understanding come from, was that from conversations that you had with Steve?

Renee: It came from, to the best of my recollection it did because he's the only person I was really talking to about that but I know that uhm there were probably other more generalized conversations with family members, DeMocker family members.

Mr. Napper: Alright and then after Steve's arrest it became clear to you that this is how the insurance proceeds were going to be spent.

Renee: It was pretty clear to me that if they could get them released that that was their intention.

Mr. Napper: Okay, in reviewing the transcripts, do you have an idea, a timeframe about when after Steve's arrest it became clear to you that this was what they were intending to do?

Renee: Uhm I'd forgotten. Well I know it was probably January of '09

Mr. Napper: And what makes you think it was probably January of '09?

Renee: Well just from reading these transcripts.

Mr. Napper: Okay and why don't we pick out the transcripts that you're referring to just so that we're, we all know what transcript we're talking about.

Renee: I'm not sure I (Inaudible)

Mr. Napper: That's okay, we'll go through them real quick.

Mr. Butner: Do you want me to help at all?

Mr. Napper: Yeah if you got it, sure

Mr. Butner: Could I draw your attention to the transcript of January 17, 2009

Renee: In this, in the first page on this statement, this is actually a misunderstanding on your part because pieces I was referring to were the pieces of the uhm the, the DeMocker family was trying to figure out what resources the entire family had to put towards a bond for Steve. If, uhm I don't remember where in the proceedings his bond reduction hearings were, but, but that was part of the process to figure out which family members had which properties and funds that they could put toward that cause. So uhm and, and that's, out of all financial dealings that's all I knew about. I didn't know about the uhm the ways in which financial agreements were being made with the insurance company or the attorney's fees. I wasn't part of any of those negotiations so in the statement the only thing I could have been referring to was the bond issue.

Mr. Napper: Let me back up on that, but

Mr. Butner: Okay let me draw your attention to the second page uhm where Steve down at the bottom you'll see that uh sentence that beings, "Well

fortunately, unfortunately, fortunately" and it goes back and then he says
"I think it will cover everything uh that the girls would choose to cover."
What was he talking about there?

Renee: Well he had to be talking about the insurance money in that sentence
because that's what the girls had control over.

Mr. Butner: Right

Renee: So my guess is from this entire conversation that we were talking about,
we were talking about his release on bond and how that was gonna be
secured and so clearly the insurance money played into that but when I'm
talking about knowing what all these pieces, or there are a lot of pieces,
sounding like I know a lot; I didn't actually know that much. All I knew
about was how the family was attempting to come up with

Mr. Butner: Well thinking back you know you mentioned that uh sometime shortly
before or shortly after Steve's arrest you became aware that the insurance
proceeds of Carol's life insurance policies were what Steve was aiming at
getting to pay for his insurance, or for his attorney's fees, right?

Renee: Right

Mr. Butner: Okay, what was it that how did you become aware of that?

Renee: It was probably through numerous conversations. I don't remember a
specific conversation.

Mr. Butner: Well is Steve the person that told you that's what he was gonna try to do is
get that insurance money?

Renee: Well he's the one I was talking with so I again I don't remember a specific
conversation but I had you know we were

Mr. Butner: Uhm and this was approximately when then that these conversations were
taking place? His arrest is October 23

Renee: Right

Mr. Butner: of 2008

Renee: Well it was obviously you know sometime after Carol's death and uhm
my best guess is sometime August of '08

Mr. Butner: Okay and did he tell you uhm that he was going to disclaim the proceeds?
Did you ever hear him say that?

Renee: I didn't hear him say that, I think, I think what I heard was uhm he, the
way I recall it and again I don't recall specific words or conversations but
the general memory that I have at the time is that the girls were gonna
receive this money, not him. I didn't know how that was gonna happen.

Mr. Butner: Okay and then what did he say (Inaudible) what did he say in terms of
what would happen when the girls received the money?

Renee: Uhm that, that the hope was they would uhm release that to pay attorney's
fees

Mr. Butner: Okay did he say how he was gonna get them to do that?

Renee: No

Mr. Butner: Okay

Mr. Napper: One thing, when you're discussing at this point

Mr. Butner: We're talking about August 2008

Mr. Napper: this is (Inaudible) do you, does

Mr. Butner: Right, that's the date you gave out

Renee: That's an approximation

Mr. Napper: (Inaudible) has anyone explained to you in details of how this is going to
happen?

Renee: Oh no

Mr. Sechez: Well and to further up on that, is this your knowledge at this point only, is
this coming from Steve only or is this coming from Steve and other family
members or attorney's at this point or was it primarily or

Renee: It was not, it was never coming from attorneys, I wasn't

Mr. Sechez: Okay

Renee: I didn't have conversations

Mr. Sechez: so at this point in, in, in your knowledge it's strictly coming from Steve confiding in you

Renee: Right

Mr. Sechez: Okay

Mr. Butner: Okay. And uhm so in January of 2009 uhm you know you two in this conversation that takes place on January 17 of 2009, you're actually talking about two things.

Renee: Right

Mr. Butner: You're talking about the pieces coming together to get a bond for Steve, right?

Renee: Right

Mr. Butner: And then uhm he's talking with you about uhm getting the insurance monies uhm which the girls, that have to go to the girls uhm by him disclaiming it. I realize you weren't familiar with that term disclaimer apparently

Renee: I got it now

Mr. Butner: Okay you understand

Renee: I do

Mr. Butner: disclaimer now, yeah okay. But he had to renounce the insurance proceeds in order for those proceeds to go to the girls, did you

Renee: Right

Mr. Butner: have that understanding?

Renee: Uhm I, I can't, there's a gap there where I can't remember because right after, where I can't remember in relation to that what he was telling me because immediately following Carol's death he said that he was not the

receive, he was not the beneficiary of those monies because of the divorce, the divorce had changed all that.

Mr. Butner: He knew that, huh?

Renee: That's what he was telling me and uhm and so that was my assumption for a period of time. That's why I can't, I, I'm not even sure I know when I understood differently, when I understood that it was in his name. In fact uhm

Mr. Butner: So when did he say this to you uhm after Carol's death. You know you said right after the, right after her death he said to you that he knew he was not the beneficiary because of the divorce, where was that, where did that take place if you can recall?

Renee: It was within the first couple of weeks

Mr. Butner: Okay and was that conversation at his residence at Alpine Meadows

Renee: I have no idea

Mr. Butner: Okay

Renee: It was somewhere here in Prescott

Mr. Butner: Yeah, you just remember him telling you that

Renee: Yeah

Mr. Sechez: At this point, is he just confiding in you about information or is he talking about including you in the process to, to possibly get the money in?

Renee: Oh he was never talking about including me

Mr. Sechez: Okay

Mr. Butner: So what did he say, you know, he says he knows he's not the beneficiary because of the divorce, did he say he knew who the beneficiary was?

Renee: No he thought it would be the girls

Mr. Butner: Right

Renee: (Inaudible)

Mr. Butner: and so in light of that fact uhm did he tell you what his plan was at that point in time in regard to those life insurance proceeds?

Renee: No I think at that point in time he was concerned about paying the mortgages on the two houses

Mr. Butner: Okay and so uhm I guess a little bit of time goes by because you indicate that sometime around August of 2008 uhm he indicates that uhm he's hoping to get the girls to release the insurance proceeds to pay for the attorney's fees, right? Okay. And uh do you remember where you were when you first heard that kinda concept come up?

Renee: No

Mr. Butner: Okay, so did he say how he planned on getting uhm the proceeds paid to the girls?

Renee: No in fact my understanding again was uhm I don't, I don't know when I became aware that, that, that he was actually still the beneficiary and that it had to go through these channels. I, my assumption for most of the summer was uhm that it was gonna be paid out to the girls and it was just a matter of when.

Mr. Butner: Uh huh, okay

Renee: And I'm sorry I forgot what your question was.

Mr. Butner: Well I didn't really have a question at that point in time, you were just kind of explaining to me. Okay so, so uh like you said you had an assumption for most of the summer, and that was based upon your conversations with Steve about the insurance proceeds. Uhm when was it that you first heard Steve verbalize to you what his plan was in terms of getting these insurance proceeds?

Renee: I don't know that I ever heard a plan.

Mr. Butner: Okay. Alright so here we are, January then, January 17, 2009 uhm and he's talking about getting the girls to choose to cover his attorney's fees and, and how much, he says in that conversation how much is left is the big question you know at least the family won't be in a hole afterwards. When he says the family not being in a hole, whose he talking about?

Renee: His family, the DeMocker family

Mr. Butner: Okay, the DeMocker family, right? Okay and that's because what did he tell you about the DeMocker family in regard to his attorney's fees?

Renee: Well they were paying them, I think he paid, I think he paid some initially himself immediately after the arrest and I'm not sure about that.

Mr. Butner: Yeah, do you know where he got the money to pay those attorney's fees right up front?

Renee: No, no

Mr. Butner: Okay

Renee: I wasn't involved in any of that

Mr. Butner: Do you know where the DeMocker, when the DeMocker family started paying attorney's fees on his behalf?

Renee: I don't, no

Mr. Butner: Okay, now uh here we are January 2009, he's talking about getting those insurance proceeds, when's the first time that, that you remember him saying something to you about I'm gonna need your help on this? You know I'm gonna, here's what you can do to help or something along those lines.

Renee: I, I don't actually recall that other than, I don't know that he ever even phrased it that way

Mr. Butner: Okay

Renee: But it was sometime after I was asked to become personal representative

Mr. Butner: You mean, were you asked to become personal representative

Renee: I thought that's what it was

Mr. Butner: or trustee?

Renee: I don't know

Mr. Napper: You guys are asking a language that she doesn't understand

Mr. Butner: I know and she brought up that term so we're gonna try to get that cleared

Renee: That's what I've always said it was so

Mr. Butner: You thought you had become personal representative?

Renee: Is that, yes I did

Mr. Butner: Okay well let me explain something to you a little bit and of course John can explain it to you too, he's your lawyer.

Mr. Napper: Before we go there you wanna back up and find out how she, how she was asked to do this and what she recollects about that and then, then
(Inaudible)

Mr. Butner: Yeah why don't you, would you tell us how, first of all would you tell us when you were asked to get involved with getting payment of the insurance proceeds and then by whom and what were you asked to do?

Renee: I don't remember the specifics of most of that. It was after I took over whatever position it was that Katie had just resigned from

Mr. Butner: Okay

Renee: so I had signed those papers, I guess it was August 18 of '09, I found it somewhere

Mr. Napper: I think they want to know though, Renee, how you got

Renee: I know

Mr. Napper: to the point where you were signing the papers

Mr. Butner: Yeah how did you get to that point?

Renee: Oh cause a minute ago you asked me about the money, I know I was asked to transfer money

Mr. Napper: Yeah no, we're backing up

Mr. Butner: Yeah we're backing up, John says back up, I said okay fine.

Mr. Napper: Yeah what I think you want to, what I think they want to know is, I just want to try this chronological (Inaudible)

Mr. Butner: Mmm hmm

Mr. Napper: How did you first, when did you, around when did you first learn that they were asking you to take over Katie's position and they want to know who it was that asked you, around when it was and what they asked you to do.

Mr. Butner: Yeah

Renee: To the best of my recollection uhm I was asked somewhere, somewhere in August. I don't think it was too very long before I actually went into to Kottke's office to sign papers so maybe two weeks earlier

Mr. Butner: So sometime around the first of August of 2009?

Renee: To my best guess

Mr. Butner: Well that's based upon the documents, right?

Renee: Right so obviously it was sometime before that

Mr. Butner: Right and you signed those documents on or about August 18 of 2009, right?

Renee: Right

Mr. Butner: Cause they were notarized on that day

Renee: Right

Mr. Butner: Okay so you got that down pat, right?

Renee: Well only because I saw the

Mr. Butner: Sure, yeah, okay and but it makes sense to you right? It refreshes your recollection?

Renee: Sure, sure

Mr. Butner: Okay go ahead and tell us what, what happened around the first part of August

Renee: Uhm I, I was, I was asked by someone, I think uhm it was in a phone call from John Sears and

Mr. Butner: Well let's stop a moment now, okay? You receive a phone call from John Sears sometime around the first of August, 2009?

Renee: Yeah, it's, I, I was in the middle of two moves at the time and I was completely spent, I was a wreck.

Mr. Butner: Okay. What does John talk to you about?

Renee: Uhm again this is a very vague memory but uhm I can't think of any other conversation with any other person so uhm I believe he's asking on behalf of Steve and the DeMocker family if I will take over for Katie because Katie is burned out as PR or Trustee, whichever position it is she's resigning from.

Mr. Napper: Okay now before we go any further this is a good time to untangle that. Do you remember what term John was using with you? Was he saying PR or Trustee

Renee: No I don't

Mr. Napper: Are you using the term PR and Trustee because you've heard it around and you're, you're plugging that in or because you specifically recall someone telling you

Renee: I don't remember anything specifically

Mr. Napper: Okay

Renee: I wish I did

Mr. Butner: Okay, what was your understanding as to what Katie's uh what was Katie's role? Was she uhm personal representative, was she a trustee, what was your understanding?

Renee: Well she may have been both and since I don't completely understand the job descriptions for those positions my, my best recollection was that I was told she was PR

Mr. Butner: Okay and, and you were asked to take over her duties?

Renee: Right

Mr. Butner: By John, okay so what did you say?

Renee: Uhm I said sure

Mr. Butner: Okay, did you know what you were gonna have to do?

Renee: No

Mr. Butner: Okay, did he explain to you?

Renee: Uhm again I don't recall the conversation and the specific, I don't recall the specifics of any of that and so my best recollection is that no he didn't explain anything. It was, uhm, I had a, I had a vague understanding of what I was being asked to do

Mr. Butner: What was your understanding?

Renee: Uhm that I was basically just taking over for Katie toward the end of the entire estate process which signified to me that there wasn't a whole lot to do. I just, they just needed someone on the ground here taking over for Katie because she was too busy with school and tired of dealing with the estate stuff.

Mr. Butner: Okay and uh so what were you going to have to do in taking over?

Renee: They didn't explain any of that to me

Mr. Butner: You didn't know what you had to do, okay.

Mr. Napper: Okay but at this point you knew that the proceeds in the trust which you were taking over were going to go to legal fees

Renee: What I knew was that insurance monies from, that Katie and Charlotte had received were gonna go to pay attorney's fees. I didn't know a trust, I didn't know a testamentary trust existed. People were using the term account or trust and I never asked what that meant or what it was, I assumed, I know what a trust account is. Anyone can open one, you guys do it for your clients all the time with fees. So I thought

Mr. Napper: Their client is the state of Arizona, their trust account is your tax bill

Mr. Butner: I still have my old trust account in case I (Inaudible) out, let me tell you buddy

Mr. Napper: (Inaudible)

Renee: So when someone says trust account to me I just figured someone in the family or the insurance company or whoever it was put the proceeds from the insurance into a trust. And basically that would have been a trust for Charlotte since Katie was already of the age of majority and Charlotte wasn't so I didn't know it was a testamentary trust. I didn't know that becoming involved in the estate meant I would control these monies. I didn't even know the monies were there, I didn't, until I walked

Mr. Butner: But you did know that they were the insurance monies that had been paid to the girls uh for their mother's death

Renee: Could you clarify that please?

Mr. Butner: Yeah well you said just a couple minutes ago that you knew that the insurance monies were there

Mr. Napper: He wants to know where did you understand the insurance monies came from, was it a car wreck or a burned house, where did

Renee: Oh I, yeah I knew there was life insurance money that was being released or had been released

Mr. Butner: Right some of it had been

Renee: Yeah and I thought Katie was in control of that but I didn't know how all of the banking worked or in which accounts

Mr. Butner: So were you told that you were just gonna take over as like a signer on the account?

Renee: That's my recollection, no on the, on

Mr. Butner: On the trust account

Renee: When I signed papers at Kottke's office was I told that?

Mr. Butner: Yeah

Renee: No not that I recall.

Mr. Butner: Okay, what were you told?

Renee: Uh what I just a few minutes ago, my best recollection is that uhm I was told I would just be uhm helping to finish out estate affairs

Mr. Butner: Okay and who told you that?

Renee: I don't remember. That could have been uhm, it was most likely John Sears and it was in, it was all in really vague terms or at least my memory of it is vague.

Mr. Butner: Did you meet personally with Chris Kottke at that time?

Renee: No

Mr. Butner: And he didn't give you any advice, you didn't consult with him at all?

Renee: Right

Mr. Butner: Okay, you just went to his office and signed these papers.

Renee: I spoke with his assistant Cynthia

Mr. Butner: Right and she's the one that notarized your signature when you signed the papers

Renee: Right

Mr. Butner: Okay, go ahead John

Mr. Napper: Renee was it your belief that the insurance monies when you signed on as the trustee was simply going to pour out of the trust account and go directly and eventually pay attorney's fees or were you told that you were actually gonna have to write something out to move the money?

Renee: At what time?

Mr. Napper: When you originally took over as the trustee

Renee: I didn't have any understanding of the, what was the first part of your question?

Mr. Napper: Were you told when you took over as the trustee that you were actually going to have to wire the money

Renee: No

Mr. Napper: out of the account

Renee: not that I recall

Mr. Napper: or did you think that was just gonna happen automatically?

Renee: I didn't think about the money. I didn't think I was gonna have anything to do with the money, I never had prior to this

Mr. Butner: Right

Renee: the family was handling all of that, I had no reason to get involved nor did I want to.

Mr. Butner: Right

Mr. Sechez: Okay you answered no to this question at first, how about at Kottke's office. Did that understanding change?

Renee: No that's what I'm talking about.

Mr. Sechez: Okay how about after that, at some point did it change?

Renee: Sure after that at some point uhm and I don't remember the exact point because it, it seemed like through reading through these transcripts that I still was under the impression Katie was gonna be moving money, not me.

Mr. Butner: Well in fact right around that same time Katie was in the process of resigning at the trustee and you were taking over, right?

Renee: Right

Mr. Butner: But Katie still moved money out on uhm August 27 is my recollection, do you remember that?

Renee: Yeah I just saw it in the other chronology.

Mr. Butner: And does that make sense to you, do you recall that happening?

Renee: Well I wasn't aware of, I was never aware of when money moved except when I did it the one time I did it.

Mr. Butner: Except when you moved it, yeah. Yeah on August 27 of 2009 Katie transferred out \$350,000

Renee: Right

Mr. Butner: to her personal account

Renee: Uh huh

Mr. Butner: and then it was transferred on uhm actually she transfers it to her personal account, transfers it to her personal account on August 17 of 2009 which is the day before you signed on to be the uh trustee on the testamentary trust account right?

Renee: Right and they were apparently waiting, I know I read a conversation in here with Steve I guess that they were, the family was waiting for her to do that before I could go sign the papers so

Mr. Butner: Okay were you aware that Katie had transferred money out of the testamentary trust into her account and then transferred it on to Janice DeMocker's account?

Renee: I didn't know what, what she was doing specifically

Mr. Butner: Okay but anyway you took over on the 18th of August, right, and uhm then uhm actually you didn't get in to sign the signature card for the account until sometime in September, right, do you remember that?

Renee: Uh I do

Mr. Butner: Does that make sense to you?

Renee: Vaguely it must have been late September

Mr. Butner: Right well I think it was around the 20th, 21st, something like that, does that make sense?

Renee: Yeah

Mr. Butner: Okay so you didn't do anything with the account during that timeframe, right?

Renee: Right

Mr. Butner: Did you know that there was money still left in the account, insurance proceeds?

Renee: I don't recall what I knew at the time about that account and what was in there

Mr. Butner: Okay, when was it that you became aware that there were insurance proceeds waiting in the account so to speak?

Renee: Well it could have been right around that time, I just don't recall.

Mr. Butner: Okay and so what happened then in regard to what you were going to do with the money that was left in the account?

Renee: Uhm I know I was, I know that at, at some point right around there maybe a little before there I was made aware that uhm Charlotte's portion of the insurance, the life insurance money which was going to be transferred to her and that I was going to be responsible for doing that.

Mr. Butner: Okay and then once the money was transferred to Charlotte, what was gonna happen to the insurance proceeds?

Renee: She was going to transfer that to her grandmother, to her grandmother's bank account (Inaudible)

Mr. Butner: And then what was gonna happen to it after that?

Renee: Uhm my understanding was that the DeMocker, senior DeMocker's were gonna pay attorney's fees.

Mr. Butner: With that money?

Renee: With that money.

Mr. Butner: Okay and who gave you this information about what was gonna happen with that money?

Renee: Uhm I don't remember specifically, I think, I'm, I'm fairly certain I had a conversation with Jan DeMocker at some point because we were discussing the, the routing numbers, just the technicalities of moving that money. And people wanted to make sure that I had the routing information to give to Katie or Charlotte, I was just a clearing house for information for that specific information at that point.

Mr. Butner: Right a clearing house for that information and a clearing house for that money.

Renee: I suppose

Mr. Butner: So you transferred how much money into Charlotte's and Steve DeMocker's account?

Renee: Uhm it was I believe it was \$350,000, I can't remember if it was exact

Mr. Butner: Okay and how did you do that?

Renee: Uhm it was a wire transfer, Charlotte and I went into the bank together, sat down at the desk, uhm signed papers. I know there was a complication because of the amount of money so it took some time. The woman at the desk had to call some supervisor. Anyway eventually it went into Charlotte's account and uhm and then immediately after that Charlotte ran up to the ATM to get a balance just so that she could say for a (Inaudible) period of time she had \$350,000 in her possession, it was very cute and then she

Mr. Butner: And then what did she do?

Renee: She stepped right up to the counter and wired it to her grandmother

Mr. Butner: And uhm what involvement with that account did you have after that?

Renee: Uhm the only involvement I have had with that account after that was paying uhm paying things that I saw as estate uhm uhm responsibilities. Paying the fees for the storage unit that housed (Inaudible)

Mr. Butner: How much were those, when you made those payments?

Renee: \$100 a month and I paid one, I wrote one check that covered several months, I think four months

Mr. Butner: Okay

Renee: So I may have made one or two payments and uhm I'm sorry I didn't have time to pull those records but I will. Uhm and then one larger chunk for, for four months, whatever that was. So Haney Street Storage got paid and I believe Doug Raider's fee got paid for the estate taxes that he did.

Mr. Butner: Okay how much was that approximately?

Renee: I don't remember, I could find the bill, I'd have to go find it.

Mr. Butner: Okay and uhm there was talk about Chris DuPont's fees or something like that, tell us about that. How were those paid?

Renee: Uhm I don't know specifically but I know, in fact I don't know how they ultimately were paid but I, I think the DeMocker's paid them. I said

Mr. Butner: You said the DeMocker's, you mean the senior DeMocker's, Janice and John?

Renee: Steve's parents and I believe my understanding is they paid them with their own money, not funds, but there was, there was at one point I believe Jan DeMocker made me aware that there was \$5,000 missing that Katie was to have transferred with her first transfer. Her first transfer was to be \$555,000 and excuse me, \$355,000 and not \$350,000. So

Mr. Butner: Right, she transferred, the bank records indicate she transferred \$354,000 and some odd dollars into her personal account and then from her personal account she transferred \$350, leaving the \$4,000 behind so to speak and

Renee: Right

Mr. Butner: what do you know what that \$4,000 some odd dollars was for?

Renee: Uhm at the time I didn't know and I actually still don't know but uhm but what I did understand at the time was that the family was concerned about that because that was the money they were gonna use to pay for the girls' attorney

Mr. Butner: Who was Chris DuPont

Renee: Yeah and they were counting on having that money to pay him

Mr. Butner: I see, did you ever find out what Katie did with that money? Did she ever tell you?

Renee: No we had, we

Mr. Napper: Let me put this in context before we go any further cause (Inaudible) to go back to the transcript, there was the transcript and I don't remember the date in which Renee is talking about calling John's office related to a letter Katie had sent Charlotte, so why don't you refer out of that transcript, Renee and explain when you're talking to Steve what you were talking about to the meaning of what you're saying.

Mr. Butner: What is the date of that transcript so I can get to it also? I remember that conversation.

Mr. Napper: And I was confused about that because, well let's have Renee go through it. We had gone through these transcripts so quickly the other day

Renee: August 10th

Mr. Butner: The August 10th phone call of 2009

(Inaudible)

Renee: No I'm sorry that's not right. Okay I think it's September 15. Yeah that's it.

Mr. Sechez: That's when you talk about the shell game.

Renee: Right

Mr. Butner: Okay tell us what the shell game was if you would for just a sec before we get to that.

Renee: Actually that was Steve's reference and uhm I think in that conversation he was talking about the well I think he was talking about the insurance money and uhm and what Katie was doing with some of the money and he says "I don't think, I have no reason to believe that there's been any kind of shell game other than when it's legally appropriate."

Mr. Butner: "That we've had to do to get the legal team paid." So tell us what the shell game was.

Renee: Well it's again it's his term but I think uhm we were that's this part of the conversation where people were concerned about what, where this missing money was and Charlotte had received a letter from Katie and uhm I knew that Charlotte was needing money at that time and I didn't know what was in the letter. I thought, I thought for no very good reason that Katie had just sent money to Charlotte and I was concerned that it was that missing chunk of money that the family seemed to need to pay attorney's fees.

Mr. Butner: But going back to I know it's Steve's term shell game, okay, tell us what the shell game referred to.

Renee: I don't, I can't tell you specifically other than what I just said. I know it had to do with uhm insurance money and what monies were being paid out, wherein he's, I think he's saying that Katie's not playing a shell game here with this money, hiding pieces of it and moving pieces of it.

Mr. Butner: Okay but let's just back up a second, alright looking at page three on that transcript and you've got it right there in front of you. Okay down at the bottom you say "Yeah, I know she had a question and who knows if that's what this is about or if it's just uhm you know the shell game."

Renee: Oh I did say that

Mr. Butner: Yes you did and then Steve responds "I don't think, I have no reason to believe there's been any kind of shell game other than the one that's legally appropriate that we've had to do to get the legal team paid."

Renee: Yeah

Mr. Butner: So tell us what the shell game was when you guys are talking about it.

Renee: I wish I can remember even saying that.

Mr. Butner: Well obviously it refers to the payment of the legal fees, right?

Renee: Fairly obviously, not said specifically in this

Mr. Butner: Sure it is, it says the legal team paid

Renee: Oh yeah, okay

Mr. Butner: Right?

Renee: Okay

Mr. Butner: Okay, it refers to paying the legal team and uh the shell game uh, does that refer to the insurance proceeds and being moved from account to account?

Renee: It must, that's my best guess but

Mr. Butner: Renee take a break, think about it, cause we don't want you guessing and I'm not gonna put words in your mouth. Okay.

Mr. Napper: Do you wanna talk to me for a minute?

Renee: I could, I don't know what's (Inaudible)

Mr. Butner: We'll go off the record for just a moment and get that cleared up

Mr. Napper: Sure

STATE'S EXHIBIT E

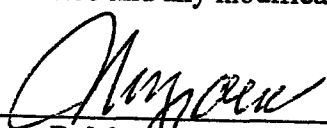
Statement of Attorney James B. Musgrove

Statements of James B. Musgrove

1. I have been licensed as an attorney in Arizona for 44 years.
2. My area of practice includes estate planning, trusts and probate.
3. I have examined the material provided to me by the State contained in the Motion for Determination of Counsel, the Chronology of Events with Exhibits and the Probate File in P1300PB 2008 0202.
4. Based on the materials I examined, I have reached the following conclusions:
 - a. The appointment of Katherine DeMocker as Personal Representative of the Estate of Carol Kennedy is in violation of the Thirteenth Paragraph of the Last Will and Testament of Carol Kennedy. That paragraph provides for the appointment of A.G. Edwards Trust Company, or its successor, as Personal Representative if none of the other named parties can serve. There is no renunciation from Wachovia Services (successor to A.G. Edwards) in the Probate File. Paragraphs 10-11 of the Petition for Formal Probate make no mention of the above.
 - b. Regarding the appointment of trustee for the Testamentary Trust, the appointment of Katherine DeMocker is questionable for the reason that she represented to the Court that Paragraph 13 of the Petition for Formal Probate states that the "Decedent's residual estate will likely be of a limited value and A.G. Edwards' trustee fees would not be cost effective for the trust to absorb." In fact, my review of the estate of Carol Kennedy reveals that the one of the Hartford life insurance policies, valued at \$500,000.00, was paid to the Estate and thereafter distributed as an asset of the estate, and, a second Hartford Life Insurance policy in the amount of \$250,000.00 was distributed directly into the Testamentary Trust. This sum of money, together with the Inventory amount in the sum of \$284,000.00 that was represented to the Court in the Petition For Appointment Of Personal Representative, is a total of \$1,034,000.00 in the Estate and Trust. The representation to the Probate Court that the "Decedent's residual estate will likely be of limited value and A.G. Edwards' trustee fees would not be cost effective for the trust to absorb"...does not represent an accurate picture of the estate. No supplemental Inventory of an Appraisal was ever filed reflecting these amounts.
 - c. The terms of the Last Will and Testament provide for the appointment of A. G. Edwards as successor corporate trustee. Wachovia Services (successor to A.G. Edwards) renounced its appointment as Trustee. The appointment of Renee Girard as successor Trustee violates trust law and the terms of the Last Will and Testament. Successor trustees must be appointed by the court. The

resignation of Katherine DeMocker and appointment of Renee Girard was never approved by the Probate Court.

- d. With regard to the Testamentary Trust created by the Last Will and Testament of Carol Kennedy, outright and free distribution of the trust funds to the beneficiaries shall occur to each daughter when she turns 25 years of age. Discretionary distributions of the trust funds to the beneficiaries prior to their age of 25 are restricted to the health, maintenance, support and education of the beneficiaries.
- e. Steven DeMocker executed disclaimers with respect to any interest in the two life insurance policies and the estate of Carol Kennedy. As a result, the benefits under policy [REDACTED] in the amount of \$250,000.00 accrued to the Testamentary Trust and benefits under policy no. [REDACTED] in the amount of \$500,000.00 accrued to the estate of Carol Kennedy. The documents in the probate file make no mention of the insurance policies or benefits; and therefore, the probate file fails to and/or falsely represents the actual value of the Estate and Testamentary Trust of Carol Kennedy.
- f. The distribution of Testamentary Trust funds before the beneficiaries turned 25 for any purpose beyond the maintenance, support and education of the beneficiaries was in violation of the terms of the Testamentary Trust.
- g. The circuitous distribution of Testamentary Trust funds resulting in the payment of Steven DeMocker's defense is in violation of the terms of the Trust and the express directives of the deceased, Carol Kennedy, as set out in her Last Will and Testament. The said distribution of the funds without first obtaining an Order from the Court after notice and hearing constitutes a breach of the fiduciary duty owed by a Trustee to the Beneficiaries of a Trust
- h. The terms of the Testamentary Trust cannot be modified without a hearing and court order (ARS 14-10410). This includes the appointment of successor trustee and any modification to the terms for distribution of the Trust funds.


James B. Musgrove

Musgrove, Drutz & Kack, P.C.
1135 Iron Springs Rd.
Prescott, AZ 86305

7/15/10
Date

STATE'S EXHIBIT F

Opinion Letter and Supplemental Opinion Letter of
Attorney Marlene Appel

Marlene Appel, PLLC
Attorney at Law

Certified Specialist: Estate and Trust
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August 6, 2010

Ms. Sheila Polk
Mr. Joseph C. Butner, II
Yavapai County Attorney Office

Dear Ms. Polk and Mr. Butner,

You asked me to review various documents regarding the death of Virginia Carol Kennedy, the administration of her probate and trust estates and the disposition of trust funds by the personal representative and trustees of her estate and to give you an opinion as whether

(1) Katie DeMocker and Renee Girard, as trustees, breached their duties in administering Carol Kennedy's trust,

(2) the actions by any of the attorneys in this matter fell below the standard of care as they pertain to the administration of Carol Kennedy's estate and trust and

(3) the actions by any of the attorneys violated any applicable ethical rules.

1. Summary of opinions

In my opinion, Katie DeMocker and Renee Giraard breached their fiduciary duties as set out below. It is also my opinion that the attorneys involved breached their duties and the professional and ethical obligations they owed as set out below.

2. Credentials

I am an attorney licensed to practice in Arizona since December 1977. I am certified as a specialist in estates and trust law by the Arizona Board of Legal Specialization and as licensed fiduciary by the Arizona Supreme Court. I have been a Commissioner and Judge Pro Tem of the Probate/Mental Health Department of the Maricopa County Superior Court since 1988.

I am a past member and chairman of the Executive Council of the Probate and Trust Section of the State Bar of Arizona, a past board member of the Estate Planning,

Probate and Trust Section of the Maricopa County Bar Association, a past member of the Advisory Committee on Estate and Trust Specialization and the State Bar Continuing Legal Education Committee and the Arizona Supreme Court's Probate Rules Committee.

I carry an AV Pre-eminent rating from Martindale-Hubbell. I have been a faculty member in, and organizer of, numerous seminars for the probate and trust bar and for judicial officers assigned to the probate/mental health division of the court. I have qualified as an expert witness in various types of cases, including criminal, civil, probate and bankruptcy, jury and bench trials. Additional qualifications are set out in my attached resume.

3. Review of records

I reviewed various documents, including but not limited to the following:

- i. Chronology of Events with Exhibits In Support of [REDACTED]
- ii. State's Exhibits A through LL
- iii. Flow chart showing how life insurance funds were disbursed
- iv. July 14, 2010 Reporter's Transcript of Proceedings

4. Carol Kennedy's Death, Divorce

Virginia Carol Kennedy was killed on July 2, 2008, at the age of 53 years. At the time of her death, she was survived by her two daughters—Katherine (Katie) DeMocker (20 years old) and Charlotte DeMocker (16 or 17 years old).

Carol Kennedy had been married to Steven DeMocker (Katie and Charlotte's father), but they were divorced on May 28, 2008. The entry of the decree of divorce revoked any legal rights Steven may have had to inheriting from Carol Kennedy's probate estate and by means of other governing documents, such as trusts and life insurance policies.

Carol Kennedy died testate, leaving a will dated June 23, 1998. Per the terms of her will, other than distribution of tangible personal property to her children, and after payment of all administrative expenses, taxes and debts, the remainder of her estate was to pour over into a testamentary trust for the benefit of her two daughters, with particular emphasis on their education and health.

5. Probate

Katie DeMocker hired Attorney Christopher (Chris) L. Kottke to represent her as personal representative (PR) of her mother's probate estate and as trustee of the testamentary trust created in her will. Attorney Kottke's website (www.ranchlaw.com)

describes him as holding a masters in tax law and practicing in the areas of taxation, trusts and estates, wills, probate, corporate law and business law, including representing clients in estate settlement disputes. He is therefore assumed to know probate and trust law and the duties owed by fiduciaries and the attorneys who represent them.

A Petition for Formal Probate of Will, Appointment of Personal Representative and Replacement of Trustee of Testamentary Trust was filed by Attorney Kottke on August 8, 2008, Yavapai County PB 2008-0202. The petition asked that Carol Kennedy's June 23 1998 will be admitted to probate and that Katie be appointed PR of her mother's probate estate and Trustee of the testamentary trust created in the will.

In the petition, Attorney Kottke informed the court that Carol Kennedy's former husband Steven DeMocker and his brother and sister-in-law could not be appointed PR because Steven and his relatives were disqualified per ARS §14-2804. (Steven DeMocker's status as nominee was revoked as a matter of law when he and the decedent were divorced about six weeks earlier.) For the same reason, Steven DeMocker's brother was also disqualified from acting as trustee of Carol Kennedy's trust.

A.G. Edwards Trust Company was also nominated as trustee, to serve with Steven DeMocker's brother. The petition sets out reasons why A.G. Edwards should not be appointed trustee and refers to a renunciation to be obtained from the corporate fiduciary. I was not given a copy of any renunciation by A.G. Edwards, so I do not know if one was signed. I also do not know if A.G. Edwards was served with the Petition for Formal Probate, etc. and the related Notice of Hearing. I have not seen the notice of hearing or any related Proof of Notice.

According to the petition, Carol Kennedy's probate estate consisted of real property in Prescott, a 2004 Acura, bank accounts totaling \$108,000, one-half interest in a deferred compensation stock award worth \$145,000 and personal property worth about \$18,000. The estate's total worth was estimated at \$284,000.

The order admitting Carol Kennedy's will to probate, appointing Katie DeMocker as PR without bond and as trustee of the testamentary trust was filed October 14, 2008.

6. Terms of will and testamentary trust

The primary purpose of estate and trust administration is to determine and carry out the decedent's or trustor's intent as expressed in the will and trust documents. Carol Kennedy's intent with regard to her estate assets is set out in her will and the testamentary trust created with regard to the residual estate. Any trustee administering the trust assets, any attorney advised the trustee as to her duties and any court construing the trust terms and reviewing the trustee's conduct must start with the terms of her trust.

Paragraph SIXTH of the will sets out Carol Kennedy's intent regarding the testamentary trust as it benefits her daughters Katie and Charlotte. The trustee is to administer the trust as a single trust until Katie reaches 25 years of age . Until that time, the trustee has discretionary power to use so much of the net income and principal necessary or appropriate for the health, maintenance, support and education of her children. Education includes college, other post-secondary school training, graduate school or professional school. The discretion given the trustee includes the right to accumulate income and add it to principal and to exhaust principal "for the purposes specified." The trustee is to consider the children's needs and, if applicable, the needs of any guardian caring for them. "Trustees shall be guided by my desire (i) to provide for the education of my children and to encourage them to obtain a college degree, and (ii) to provide adequately for the health of my children." ¶6.2

Upon Katie reaching 25, the trust is to divided into equal shares, one share to be distributed to Katie free of trust and the other share to continue in trust until Charlotte reaches 25 or the trust is otherwise used up for the purposes specified by Carol Kennedy.

The trust includes a spendthrift provision (¶7.1) that restrains either voluntary or involuntary transfers of a beneficiary's interest, §14-10104(18). A spendthrift provision in a trust is enforceable subject to exceptions, none of which apply in this case, §§10-10502 through -504.

Paragraph 7.3 requires the trustee to give priority to the interests of the income beneficiaries. "*Trustees are directed to consider only the welfare of income beneficiaries in the exercise of discretionary powers* and to disregard the welfare of any successor beneficiaries." Emphasis added. No beneficiary has the right to compel the trustee to make any discretionary payment or expenditure.

Paragraph 7.7 does allow early termination of the trust if the assets fall below \$50,000 if it would no longer be cost effective to administer the trust.

7. Life insurance

There were two Hartford policies insuring Carol Kennedy's life at the time of her death, totalling \$750,000. These policies were purchased in 1998 and 2001, before the divorce. Steven DeMocker was the primary beneficiary on both policies. Steven DeMocker filed death benefits claims but Hartford refused to pay out the proceeds to him because of the active homicide investigation into Carol Kennedy's death and his being named a suspect, and eventually charged with her murder.

Apparently, to get around Hartford's refusal to pay the proceeds directly to him, Steven DeMocker signed disclaimers. This then allowed the insurance company to pay the proceeds to any contingent beneficiary or, if none, to Carol Kennedy's estate.

One policy did not have a contingent beneficiary, so the funds were paid into the probate estate. The other policy named the trustee of the trust as contingent beneficiary so the funds were paid into the trust account. As PR of the probate estate, Katie eventually distributed the funds from the probate estate account to the trust account. The end result is that the life insurance proceeds ended up in the trust's account.

On March 30, 2009, a letter with the disclaimers, claim forms and other documents was sent to Hartford in order to obtain payment of the proceeds. The letter was sent by Attorney Robert E. Schmitt and informed Hartford that his firm did not represent either the PR of the probate estate or the trustee of the trust, the payees of the two policies. The proceeds from both policies were paid out on April 13, 2009. The funds were deposited into the estate and trust accounts on April 16 and April 23, respectively.

8. Plan to use trust money to pay Steven DeMocker's defense fees

On October 23, 2008, Steven was arrested and later indicted for first degree murder in Carol Kennedy's death, Yavapai County cause P1300 CR 2008 1339, State v DeMocker. He then retained criminal defense attorneys. I do not know what fee arrangements were made but reasonable inferences can be drawn from the facts that the attorneys, John Sears and Osborn Maledon, would be incurring hundreds of thousands of dollars in fees given the nature of the charges. The only apparent source of money to pay the fees were the life insurance proceeds and whatever other cash assets were available from Carol Kennedy's estate and trust.

Based on portions of transcripts of conversations between Steven DeMocker and Katie and Steven DeMocker and his girlfriend Renee Girard, Katie as PR/Trustee would distribute trust funds to herself and then transfer the funds to her grandmother Jancie DeMocker, Steven's mother. She would use as much of the trust fund as necessary.

In a March 17, 2009 jail cell call between Steven DeMocker and Katie DeMocker, State's Exhibit K., the discussion centered on Steven DeMocker's attempts to get Katie's agreement to use the trust funds as he decided ("...that I am gonna make the decisions how how [the funds] are deployed...") and to whatever extent was necessary to pay for his bond and for his defense, even if that meant using up every dime of the money. ("But we may need every penny of it for defense and I need to make certain that you understand that there will be no impediment to that if that's what we need.") In this conversation, Steven DeMocker refers to the attorneys constructing what can only be assumed is a plan to obtain the funds and that Katie's cooperation was necessary.

Katie repeatedly told her father that she had to make sure that her sister Charlotte goes to college and that she was not going to take money that was to be used for Charlotte. Steven DeMocker made it clear that his defense needs were more important than Charlotte's needs, that he needed to know Katie would not be in the way and that his life was in the balance. The conversation appeared to get intense and heated as Katie

expressed her unwillingness to turn over all the funds and her frustration at the pressure being put on her.

Apparently, as a result of Katie's refusal to comply with her father's demands that she put his interests ahead of Charlotte's and that she pay over as much of the trust funds as necessary, it was decided that she would resign as trustee in favor of Girard. Girard was not only Steven DeMocker's girlfriend, she was also Charlotte's custodian under a parental power of attorney given to her by Steven as Charlotte's father.

Steven DeMocker, as guardian of his minor child Charlotte, signs Katie's Acceptance of Resignation and the appointment of his girlfriend Girard as successor Trustee on July 10, 2009, State's Exhibit V. Girard signs the same document acting under the Parental Power of Attorney for the minor Charlotte. Katie DeMocker also signs.

On July 19, 2009, Steven DeMocker files a motion asking the court to find him to be indigent.

Katie DeMocker signs the Resignation as trustee on August 5, 2009, State's Exhibit V. Girard signs the Acceptance as Trustee on August 28, 2009, State's Exhibit W.

After her appointment as trustee, Renee signs the signature card for the trust bank account. In a jail call with Girard on September 15, 2009, Steven DeMocker asks Girard to make it clear with Katie that everybody needs to stick to their commitments regarding the plan that was "constructed", presumably the plan to funnel the trust funds to the defense attorneys. References are made to the plan being proper and planned out by the attorneys and that the right paper trail is occurring and the right sequence of payments are made. In the same conversation, Steven DeMocker says he asked Charlotte to check in with John (presumably, his attorney John Sears) so that she understands because he's not sure Charlotte remembers the sequence and her role and her part that will happen in three weeks.

Nowhere do I see any indication that either Katie or Charlotte were advised to seek independent counsel or in fact consulted with independent counsel. Nor do I see any indication that they were advised of any conflicts of interest any of the attorneys representing Steven DeMocker may have had, assuming the accuracy of references that one or more of the defense attorneys may have met or talked to either of them. It should also be pointed out that Attorney Kottke represented Katie as PR/Trustee and it would be a conflict of interest for him to also represent or advise Katie or Charlotte as beneficiaries, given the obvious adverse interests the facts disclose.

I was told that Girard did not have separate counsel, she was not give a copy of Carol Kennedy's will and trust, she did not know its terms, she was not advised of her duties as trustee and she was told by Attorney John Sears that she was just to do what

she was told and sign the documents presented to her. I do not have any independent confirmation of these facts. The records indicate that many of the documents were drafted by Attorney Sears and the signing of the documents were supervised by him and he or members of his staff acknowledged signatures.

Earlier this year, Attorney Sears acknowledged to the court that Girard was installed as trustee for the purpose of waiting until Charlotte was 18, at which time funds would be distributed to Charlotte who would then exercise her independent adult judgment to transfer the monies to help her father.

9. Monies transferred to Steven's parents and then attorneys

On August 12, 2009, Katie transfers \$453,900 from her mother's estate account to the trust account. Five days later, she distributes \$454,700 to herself, depositing the funds into her personal account. Ten days later, she transfers \$350,000 from her account to her grandmother Janice DeMocker, Steven DeMocker's mother.

On October 15, 2009, in a jail call with Girard, Steven DeMocker asks her if she feels like moving \$350,000 around today. Girard agrees to get on it. Steven DeMocker's mother will pay another \$5000 and then he'll talk to Katie and see if she and Charlotte can figure out the other "missing 5".

The same day, Girard transfers \$350,000 from the trust account to a bank account titled jointly in Steven DeMocker and Charlotte DeMocker's names. A wire transfer in the same amount moves the money to Janice DeMocker's account. Charlotte has now turned 18.

On October 27, Janice DeMocker pays out \$100,000 to Attorney John Sears and \$250,000 to Osborn Maledon. The next day, another \$100,000 was paid to Attorney Sears and another \$250,000 was paid to Osborn Maledon. The State's flow chart shows the movement of the funds from Hartford through the estate and trust accounts, to Katie and Charlotte, to Janice DeMocker and finally to the attorneys.

10. Duties of Trustee

The fiduciary duties of a trustee are set out in §14-10801 through -817 and as supplemented by the common law and principles of equity.

A trustee has the duty to administer the trust in good faith in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with the Trust Code, §10-10801.

"A trustee shall administer the trust *solely* in the interests of the beneficiaries."

7
§10-10802.A, emphasis added. This is known as the duty of loyalty. It prohibits a trustee from using trust assets for anyone other than the trust beneficiaries. It also prohibits self-dealing and conflicts of interest.

Acts taken by a trustee in violation of the duty of breach is voidable by the beneficiary unless the transaction was authorized by the trust or by the court, the claim is time barred, the beneficiary consented or ratified the act (discussed below) or the act was in accordance with a contract that existed before the trustee took office.

A trustee must act impartially when there are two or more beneficiaries, §14-10803.

A trustee must administer the trust as a prudent person would, considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. §14-10804. If a trustee has special skill or expertise, she must use those special skills or expertise in administering the trust. §14-10805.

11. Breaches of Duty

Katie, as PR/Trustee and Girard, as successor Trustee, breached their duties owed to the beneficiaries of Carol Kennedy's trust. Katie's distribution to herself violated the terms of the trust because she was not in need of such a large sum of money and the intent was to funnel the funds to her father for his benefit. She breached her duty by resigning in favor of Girard and by accepting Girard's appointment as successor trustee knowing that Girard's appointment was to further the plan to divert trust funds to Steven DeMocker's attorneys. She also breached her duty by not reporting the plan to the court.

Katie also breached her duties as a co-beneficiary with control or possession of trust assets, Christman v Seymour (App Div 2 1985) 145 Ariz 200, 700 P2d 898 and Golleher v Horton (App Div 1 1986) 148 Ariz 537, 715 P2d 1225.

Attorney Kottke appears to have disappeared on the records. To the extent he knew or participated in the plan to divert the funds, he breached the professional and ethical duties he owed to his fiduciary client and fell below the standard of care. To the extent he did not advise his fiduciary client of her duties, he fell below the standard of care.

Girard as successor trustee, and as agent under the parental power of attorney, breached her duties as well and for the same reasons as ascribed to Katie. Her duty to care for Charlotte as substitute parent exacerbates her breaches.

To extent Steven DeMocker, Attorney Kottke, Attorney Sears, any of the other attorneys and Janice DeMocker knew that the actions taken by Katie and Girard were

breaches of duty and torts, they aided and abetted in the diversion of the trust assets in violation of the trust terms and the duties owed to the trust beneficiaries. To the extent any of the facts should have been reported to the court, they violated the candor to the court required by Ethical Rule 3.3.

To the extent the attorneys advised Katie or Girard regarding the handling of the trust funds while representing Steven DeMocker or his interests, they violated Ethical Rule 1.7 prohibiting concurrent conflicts of interest. To the extent any such conflicts were waivable, and I do not think any were, they were obligated to obtain written informed consent from Katie and Girard.

To the extent any of the attorneys advised Girard and Charlotte regarding the handling of the trust assets, while Girard and Charlotte were unrepresented, they violated Ethical Rule 4.3. The comments to the rule state that the risk of the attorney compromising the interests of unrepresented persons is so great that all the attorney can do is advise the other person to obtain counsel. The comments also takes into the consideration the experience and sophistication of the other person and the circumstances.

12. Arguments raised by Steven DeMocker and his attorneys are not factually correct or supported by law.

a. The money was Steven DeMocker's to give to the girls as he pleased.

This is a mis-statement of fact and of law. As stated in the August 8, 2008 Petition for Formal Probate of Will, etc. Steven DeMocker's status as beneficiary of the two life insurance policies was automatically revoked by operation of law per ARS §14-2804. His beneficiary status terminated on May 28, 2008, when the Decree of Dissolution was filed. His later disclaimers had no legal effect in terms of the prior revocation. While the disclaimers may have been prepared and sent to Hartford to speed up the process of paying out the life insurance proceeds, the disclaimers had no legal effect vis-a-vis the termination of Steven DeMocker's status as a revoked beneficiary.

Attorney Kottke, who represented Katie as PR/Trustee, drafted the petition (so he obviously knew this to be the law) and presumably advised the other attorneys accordingly. If he (or any of the other attorneys) knew the various parties and attorneys were operating on this assumption and did not correct them, he (and they) fell below the standard of care.

b. The trust funds belonged to Katie and Charlotte and they could do what they wanted with the monies.

This is a mis-statement of fact and of law. While funds are in the hands of a PR, trustee or other fiduciary, the funds belong to the estate. They do not belong to the

beneficiaries until they are paid out (despite the common assumption of many people that their ultimate right to receive the assets of an estate means those assets belong to them before distribution). In re Estate of Gordon (Div 1 App 2004) 207 Ariz 401, 87 P3d 89, ¶137

The monies could not be used as Katie and Charlotte wanted. The monies were supposed to be administered by the trustee in accordance with the terms of the trust until Katie turned 25, at which time, she would receive her share outright, the remainder to continue to be administered for Charlotte's benefit until she turned 25.

Again, these legal concepts would be well-known to Attorney Kottke and he could and should have so advised the other attorneys as well as his fiduciary client. If he (or any of the other attorneys) knew the various parties and attorneys were operating on these assumptions and did not correct them, he (and they) fell below the standard of care.

c. The trust could be terminated or modified by applicable trust law.

This is a mis-statement of the law. Upon Carol Kennedy's death and the admission of her will to probate in October 2008, the testamentary trust created in the will became an irrevocable trust. When a trust is irrevocable, it cannot be modified or terminated except as authorized by law.

The Arizona Trust Code, effective December 31, 2008, applies to all trusts created before, on or after January 1, 2009 and to all judicial proceedings concerning trusts commenced on or after January 1, 2009. None of the exceptions appear to apply. Even if they did, the applicable trust law in effect before adoption of the Arizona Trust Code did not differ.

Per §14-10105, the terms of a trust prevail over any provision of the Trust Code except, among other things, the duty of a trustee to act in good faith and in accordance with the purposes of the trust and the power of a court to modify or terminate a trust under §§14-10410 through -016. In other words, the duty of a trustee to act in good faith and follow the trust is mandatory and cannot be written out by the trustor and cannot be ignored by the trustee or the court. It also means that a trust cannot be modified or terminated except as authorized by one of the listed statutes or by the common law of trusts and principles of equity so long as the latter do not contravene the Trust Code provisions.

A trust can terminate to the extent it is revoked or expires pursuant to its terms, no purpose of the the remains to be achieved or the purposes have become unlawful, contrary to public policy or impossible to achieve, §14-10410A. None of these conditions apply to Carol Kennedy's trust.

A noncharitable irrevocable trust (such as Carol Kennedy's trust) may be terminated or modified on consent of all the beneficiaries "*if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust*" (re termination) or "*if the court concludes that modification is not inconsistent with a material purpose of the trust*" (re modification), §14-10411, emphasis added. Termination or modification requires approval of the court.

There is nothing in the documents reviewed by me that shows that the required court approval was requested to in effect funnel the trust funds to Steven DeMocker or his criminal defense attorneys. This is no surprise because the chances of any court approving use of Carol Kennedy's trust funds to pay the criminal defense attorneys of the person accused of murdering her (no matter who) and thereby depriving her children of funds to be used for their health, education and support was nil. It wouldn't matter what crime Steven DeMocker was charged with or who his alleged victim was. Paying for his criminal defense was not, is not and could never be a material purpose of Carol Kennedy's trust.

Even if court approval were requested, there is no reasonable basis to support the claim that (1) continuance of the trust was no longer necessary; that is, there was no longer any need to administer \$750,000 cash for the education, health and support of Katie and Charlotte; (2) that using the trust funds for Katie and Charlotte's education, health and support was not a material purpose of the trust; or (3) payment of Steven DeMocker's criminal defense attorneys is consistent with a material purpose of Carol Kennedy's trust. Any attorney asserting that payment of Steven DeMocker's criminal defense attorneys was a material purpose of Carol Kennedy's trust would be misrepresenting the facts and the law.

The other statutes governing modification and termination of trust do not apply: §10-10412 (unanticipated circumstances or inability to administer trust effectively), §10-10413 (cy pres), §10-10414 (uneconomic trust), §10-10415 (reformation to correct mistakes) and §10-10416 (achieving settlor's tax objectives).

d. Not a nonjudicial settlement\

To the extent an argument is made that what happened falls within the ambit of a nonjudicial settlement agreement, that violates §14-10111. Interested persons may enter into a binding nonjudicial settlement but such an agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that a court could properly approve. Any modification or termination of a trust must comply with the Trust Code provisions. To the extent the resignation of Katie as trustee, after distributing \$350,000 to herself which was then sent to her grandparents to be sent on to her father's defense attorneys, followed by the installation of Steven DeMocker's girlfriend as successor trustee with the pre-planned intent to distribute another \$350,000 to Charlotte once she turned 18, which in turn would be promptly sent

to her grandparents and then to her father's defense attorneys, constituted a nonjudicial settlement, it would violate the material purposes of the trust.

E. Beneficiary's consent, release or ratification of a trustee's breach

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented or ratified the breach or released the trustee unless (1) the consent, release or ratification was induced by improper conduct of the trustee or (2) at the time of the consent, release or ratification, the beneficiary did not know of her rights or of the material facts relating to the breach.

The remedies for breach of trust are set out in §§14-11001 through -1004 and in supplemental law and include surcharge judgments, punitive damages where appropriate, pre- and post-judgment interest, the imposition of a constructive trust for trust assets held by another person or that can be traced to another person and reimbursement of attorneys fees and costs incurred in prosecuting the claim.

I reserve the right to change my opinions upon receipt of additional information. Please call me if you have any questions.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Marlene Appel".

Marlene Appel

Marlene Appel
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Certified Specialist: Estates and Trust
License Fiduciary #20103 (Arizona Supreme Court)

Recipient: 2007 Eleanor Ter Horst Distinguished Service Award
Presented by the Probate and Trust Section of the State Bar of Arizona to attorneys or judicial officers who demonstrate superior knowledge in probate, trust and GC law; consult with the bar, the court and the public on substantive and procedural matters; participate in related committees and projects and enhance public awareness of probate and trust law issues.

✱ Education:

1974 BA Cum Laude Arizona State University, Tempe, Arizona
Northwestern University, Evanston, Ill.

1977 JD College of Law, Arizona State University

Nature of Practice:

95% Probate and trust litigation and administration, guardianships, conservatorships, fiduciary appointments in complex or difficult cases, special master and guardian ad litem appointments, mediation, expert witness consultation

5% Civil litigation as related to core practice

AV Pre-eminent Martindale-Hubbell rating

Judicial Experience:

Judge Pro Tem (1990--present) and Commissioner Pro Tem (1985--present), Probate/Mental Health Division, Maricopa County Superior Court

Private arbitration and mediation.

Qualified as special master and guardian ad litem.

Arbitrator under mandatory arbitration rules of Superior Court.

Description of Practice:

Estate administration; fiduciary appointments in complex or difficult cases; the appointment, removal or termination of guardians, conservators, trustees and personal representatives; personal injury settlements for minors and incapacitated adults; accountings; creditor claims; contested matters, including will and trust contests; elder abuse; financial exploitation; surcharge proceedings; interpretation of trust documents; trust administration; discovery disputes; evidentiary trials and hearings; emergency appointments; contempt proceedings; expert witness consultation

Professional Activities:

- 2010- Estate and Trust Advisory Commission, State Bar of Arizona, See description of commission's work below re prior 1991-98 service
- 2009 Faculty, Arizona College of Trial Advocacy, State Bar
- 2008- *SuperLawyers* designation
- 2007 Adjunct Professor, Phoenix College of Law
Fall Wills and Estates Practice Skills Module
- 2006-- Arizona Supreme Court Probate Rules Committee
Recipient, 2008 Achievement Awards, Arizona Judicial Branch (Honorable Mention)
- 1995-- Probate Litigation Committee, Sole Practitioner Section
- 1996-98 Board Member, Maricopa County Bar Association, Estate Planning, Probate and Trust Section
- 1991-98 Advisory Committee on Estate and Trust Specialization - created standards for certification of specialists in estate and trust law under Board of Legal Specialization; drafted, administered and graded required written exams; conducted peer review of applicants for compliance with technical, professional and ethical standards; recommended approval or denial of certification as specialist.
- 1991-95 Continuing Legal Education Committee, State Bar
- 1988-92 Executive Commission, Probate and Trust Section, State Bar of Arizona (1990-91 Co-chairman)
- 1993 Ad Hoc Committee on Training/Responsibilities of Counsel, Probate Bar Committee, Maricopa County Superior Court

1994 Judge, Jessup International Moot Court Practice Session,
Arizona State University College of Law

Member: Arizona and Maricopa Bar Associations
Arizona Association of Women Lawyers
Lorna Lockwood Inn of Court
Arizona Fiduciary Association
National Academy of Elder Law Attorneys

Past Member: 1978-81 Phoenix Commission on Housing
19 -91 Executive and Professional Business Women
1996-99, 2006- Lorna Lockwood Inn of Court

Former part-time instructor: Business Law, Glendale Community
College

Lectures frequently on probate and trust administration and
litigation, guardianships, conservatorships, professionalism and
ethics, including the State Bar Course on Professionalism.

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August 6, 2010

Ms. Sheila Polk
Mr. Joseph C. Butner, II
Yavapai County Attorney Office
255 East Gurley Street
Prescott, Arizona 86301

Dear Ms. Polk and Mr. Butner,

I am enclosing the original opinion letter, but I did correct the typos I found. Those are in blue (except for Mr. Kottke's website), so there is no question that there are no other changes to the letter emailed to you earlier today.

There are a few other corrections, so this letter actually supplements my opinion letter. On page 7, second paragraph in section 9, regarding the transfer of \$350,000 by Girard from the trust account to the account owned jointly by Steven and Charlotte DeMocker, the date should be October 19, not "the same day", referring to October 15. However, on the same day, October 19, Charlotte wired the \$350,000 to her grandmother.

On page 9, second full paragraph, the attorneys violated Ethical Rules 4.3 and 1.7. I inadvertently left out the citation to ER 1.7.

On page 12, first full paragraph under Section E, the following was inadvertently omitted.

From what I reviewed, Katie appears to have known that she was not supposed to use the trust funds except as set out in her mother's trust. She may not have known the true extent of her rights as a beneficiary or of the true extent of the breaches she was under pressure to commit. Charlotte appears not to have known of her rights or of the material facts relating to the breaches by her sister and her POA guardian. There are several references to having one or both of them talk to John, who I am assuming is John Sears, one of Steven DeMocker's attorneys. These references are in the context of making sure Katie and Charlotte know what to do and go along with the plan. The pressure that was put upon these two young women was severe. It would have been very difficult for most people to defy the combined pressure of Steven DeMocker, his attorneys, the probate

Ms. Sheila Polk
Mr. Joseph C. Butner, II
August 6, 2010
Page Two

attorney, Steven's girlfriend and perhaps the grandparents. I believe these two young women were unduly influenced and matters were made worse by the fact that they had no one advising them who was not also working for or in the interests of Steven DeMocker.

On page 6, third full paragraph, the date of Steven DeMocker's motion to be declared indigent should be July 10, not July 19. July 10 is the same date on which he and Girard accepted Katie's resignation as trustee and installed Girard as successor trustee.

The disclaimers signed by Steven DeMocker were legally effective independent of the revocation of his beneficiary status by reason of the divorce. In other words, if Steven DeMocker had not been divorced or if the divorce did not revoke his status, his disclaimers were nevertheless effective. He was then treated as if he predeceased the insured, Carol Kennedy. I'm not sure my opinion letter made this clear.

I agree with the opinions set out by Attorney James Musgrove in his July 15, 2010 letter except to the extent he believes the court may have had the authority to terminate or modify the trust after proper notice and a hearing. I do not think it would have had that authority as set out in my opinion letter.

Please let me know if there is anything else you want me to research or review.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Marlene".

Marlene Appel